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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 436

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF JOHN M. ENRIGHT, DECEASED, JAMES G. ENRIGHT, EMMA E. NEILSON, AND MILDRED L. ENRIGHT, EXECUTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1940
CERTIORARI GRANTED NOVEMBER 12, 1940

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June 2, 1939. Motion for extension of 15 days to file brief filed by General Counsel.
June 16, 1939. Motion for extension to June 30, 1939, to file brief filed by taxpayer.
June 17, 1939. Motion for extension to June 30, 1939, to file brief filed by General Counsel.
3 June 29, 1939. Stipulation to correct the transcript and for extension to June 30, 1939, to file briefs, filed.
July 5, 1939. Motion of June 16, 1939, granted.
July 5, 1939. Brief filed by taxpayer. 7/12/39 copy served on General Counsel.
July 10, 1939. Brief lodged by General Counsel.
July 12, 1939. Motion of June 17, 1939, granted.
July 25, 1939. Reply brief lodged by General Counsel.
July 25, 1939. Motion for leave to file the above brief filed by General Counsel. 7/29/39 granted.
Aug. 28, 1939. Memorandum opinion rendered. John E. Murdock, Div. 3. Decision will be entered under Rule 50.
Nov. 21, 1939. Decision entered, J. E. Murdock, Div. 3.
Nov. 25, 1939. Petition for review by United States Circuit Court of Appeals, Third Circuit, with assignments of error filed by taxpayer.
Nov. 25, 1939. Præcipe for record filed by taxpayer.
Dec. 6, 1939. Proof of service of filing petition for review and præcipe filed.
Jan. 20, 1940. Agreed statement of evidence, stipulation of facts lodged.
Jan. 20, 1940. Agreed statement of evidence, stipulation of facts approved and ordered filed.
Jan. 20, 1940. Agreed præcipe for record filed.
Jan. 22, 1940. Order extending time to February 1, 1940, for transmission and delivery of the record, entered.

4 Before United States Board of Tax Appeals

Docket No. 93754

JAMES G. ENRIGHT, EMMA E. NEILSON, AND MILDRED L. ENRIGHT, AS EXECUTORS OF THE ESTATE OF JOHN M. ENRIGHT, DECEASED, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition

Filed May 24, 1938

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of In-

ternal Revenue in his notice of deficiency IT:B:1 UVT-90D, dated March 5, 1938, and, as a basis of their proceeding, allege as follows:

(1) Petitioners are the executors under the last will and testament of John M. Enright, who died a resident of Freehold, New Jersey, November 19, 1934.

Their address for the purpose of this proceeding is with the firm of McDermott, Enright & Carpenter, 75 Montgomery Street, Jersey City, N. J.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners, dated March 5, 1938.

(3) The tax in controversy is an income tax for the taxable year ended December 31, 1934.

The amount of the alleged deficiency is $16,250.52, all of which is in controversy.

(4) Prior to November 19, 1934, John M. Enright, James D. Carpenter, Jr., Howard C. Gilmour, Carl S. Kuebler and Patrick A. Dwyer were partners engaged in the practice of the law at 75 Montgomery Street, Jersey City, New Jersey, under the firm name of McDermott, Enright & Carpenter.

On November 19, 1934, John M. Enright, senior member of said firm, died testate, and said partnership, by reason of said death, forthwith dissolved.

As of the following day the surviving partners formed a new partnership under the firm name of McDermott, Enright & Carpenter, practicing law at the same address.

On said date the assets of the firm of McDermott, Enright & Carpenter consisted of:

(1) cash on hand available for distribution;

(2) accounts receivable on bills already rendered clients;

(3) pending cases in which some work had been done and on which additional work had to be done before the amount of fees to be charged could be determined and the cases billed to clients.

(5) At and prior to the date of Mr. Enright's death, his interest in the net earnings of McDermott, Enright & Carpenter was 34½ percent thereof.

(6) For the purposes of making and filing the Federal estate tax return and the New Jersey transfer inheritance tax return, the senior surviving partner of the firm of McDermott, Enright & Carpenter made a determination of the value of Mr. Enright's interest in the firm at the date of death, and his determination was as follows:

Interest of decedent in the firm income received to date of death (from the date of the last accounting, October 4, 1934)	$4,143.81
Interest of decedent in outstanding accounts receivable	2,055.55
Interest of decedent in estimated value of work in process	40,855.77
	47,055.13

6 In the income tax return filed by your petitioners as executors of decedent, for the year 1934, your petitioners included said item of $4,143.81 as income accrued to the date of death.

The remainder of $42,911.32 was nothing more than the estimated value for estate tax purposes of Mr. Enright's interest in the accounts receivable of the dissolved firm and the estimated value for such purposes of decedent's interest in the unfinished law business that was in the office at the time of dissolution of the firm.

(7) Petitioners further allege that the firm of McDermott, Enright & Carpenter had nine matters pending in the office as of the date of Mr. Enright's death, on which work was being done on a fixed fee basis and Mr. Enright's share of the amounts earned in said matters to the date of his death was $1,024.89, which amount is included in said sum of $42,911.32. In none of such matters, however, were the fees payable at the date of death but they were payable on a per month or per annum basis at future dates.

(8) Petitioners further show that all the remaining business of the firm was being handled on the basis of the firm being paid a reasonable fee for the work done, taking into account the results accomplished and the time and effort devoted to the cases. The amounts ultimately realizable in such cases largely depended upon the skill with which the work, after the date of death, was done and the resulting success that might be obtained.

(9) Petitioners further show and charge that while the above amount of $42,911.32 was estimated for the purposes of the Federal estate tax return and the New Jersey inheritance tax return as the value of decedent's interest in the firm as of the date of death, actually the liquidation of the assets of the firm of McDermott, Enright & Carpenter, including pending cases, has resulted in the following amounts being collected for and

7 paid to your petitioners by McDermott, Enright & Carpenter, new firm, from liquidation of the business of the old firm:

November 19, 1934, to December 31, 1934	$5,497.15
For the calendar year 1935	24,942.52
For the calendar year 1936	6,793.39
For the calendar year 1937	5,578.51
January 1, 1938, to May 16, 1938	2,068.53
	44,880.10

(10) Petitioners further show and charge that of the estimated value of the accounts receivable, $5,958.12, there is still uncollected $1,460.04, some of which may not be collected.

(11) Petitioners further show that there are still forty-eight cases that were in the office on the date of Mr. Enright's death that still remain to be concluded, from which, if concluded successfully, your petitioners will have a further interest.

(12) Petitioners are informed by the new firm of McDermott, Enright & Carpenter that they confidently believe that decedent's interest in the old firm will ultimately liquidate at in excess of $46,000 instead of the estimated sum of $42,911.32.

(13) Your petitioners further show and charge that the alleged deficiency asserted in this case arises because the Commissioner erroneously has redetermined decedent's income for the year 1934 by adding to the gross income of said year said sum of $42,911.32 as income accrued to the date of death.

(14) Decedent, John M. Enright, filed his income tax return on the cash basis.

(15) Petitioners allege that said redetermination is erroneous for the following reasons:

(1) Said sum was not in fact income accrued to the date of death.

8 (2) Decedent's interest in the outstanding accounts receivable of the old firm of McDermott, Enright & Carpenter, as of the date of death, was not income accrued to decedent until the bills rendered on the outstanding accounts were paid and the money received by McDermott, Enright & Carpenter, and when such bills were paid to said firm, then, for the first time, income may be said to have accrued to the extent of the interest of Mr. Enright in the amounts paid.

(3) Decedent's interest in the unfinished business of the firm as of the date of death was not income accrued either to the firm or to decedent as a member thereof, for the following reasons:

(a) Nine matters in the office were being handled on a fixed fee basis and the total amount of the interest of John M. Enright therein earned to the date of death was $1,024.89. In none of such matters were the fees payable at the time of death, but they were payable on a per month or per annum basis at future dates.

(b) All of the remaining business of the firm was being handled on the basis of the firm being paid a reasonable fee for the work done, taking into account the results accomplished and the time and effort devoted to the cases. The amounts ultimately realizable in such cases largely depended upon the skill with which the work, after the date of death, was done and the success that might be obtained.

(c) Had a successor firm not been formed which took over and liquidated the business of the old firm, the amount that could have been collected for the work done to the date of the dissolution of the old firm would have been a mere fraction of the amount ultimately collected.

(15) Petitioners did not sell the interest of the decedent, John M. Enright, in the firm, to the surviving partners or anyone else, but they have been paid from time to time the interest of John M. Enright in the business of the old firm as it has been gradually liquidated. Liquidation will not be completed for another year or more.

9 (16) Petitioners further show and charge that they paid Federal estate taxes on the basis that decedent's interest in the firm of McDermott, Enright & Carpenter, as of the date of death, was worth $42,911.32, and that it would be unfair and unjust that they should, in addition, pay income taxes on the whole of said sum for the year in which he died as though it were income accrued to the date of death.

(17) Petitioners aver that if it should be determined by this Board that said sum of $42,911.32 should be added to decedent's gross income for the calendar year 1934, and they should be compelled to pay the tax under review, it will then necessarily follow that petitioners overvalued decedent's interest in the firm in filing their Federal estate tax return, and, in such event, they will claim that decedent's interest in the firm of McDermott, Enright & Carpenter was actually worth not $42,911.32, but such amount less the income tax thereon, or, in the alternative, that there should be allowed as a deduction against the gross estate the amount of the deficiency of income taxes for 1934, from which this appeal is taken, and they pray the right of recoupment accordingly.

Wherefore, petitioners pray that this Board may hear the proceeding and set aside and vacate the determination of income tax liability made by the Commissioner of Internal Revenue set forth in the notice hereto annexed, and that petitioners may have such other relief as may be proper.

JAMES G. ENRIGHT,
EMMA E. NEILSON,
MILDRED L. ENRIGHT,
Executors of the Estate of John M. Enright, Deceased, Petitioners.

JAMES D. CARPENTER, JR.,
Counsel for Petitioners,
75 Montgomery Street, Jersey City, N. J.

10 [*Duly sworn to by James G. Enright et al.; jurat omitted in printing.*]

Know all men by these presents, that we, James G. Enright, Emma E. Neilson, and Mildred L. Enright, executors under the last will and testament of John M. Enright, deceased, hereby constitute and appoint James D. Carpenter, Jr., and/or Elmer J. Bennett as our attorneys to prosecute all tax matters in relation to the estate of John M. Enright, deceased, before the United States Board of Tax Appeals.

In witness whereof, we have hereunto set our hands and seals this twenty-third day of May 1938.

JAMES G. ENRIGHT, [LS]
EMMA E. NEILSON, [LS]
MILDRED L. ENRIGHT, [LS]
Executors of the Estate of John M. Enright, Deceased.

Signed, sealed, and delivered in the presence of:

ALICE M. BOYLE.

11 *Exhibit A to petition*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Mar. 5, 1938.

Address Reply to Commissioner of Internal Revenue and Refer to Mr. James G. Enright et al., Executors, Estate of John M. Enright, Deceased, 75 Montgomery Street, Jersey City, New Jersey.

SIRS: You are advised that the determination of the income tax liability of John M. Enright, deceased, for the taxable year ended December 31, 1934, discloses a deficiency of $16,250.52, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:Cl:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of inter-

12 est, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.
By W. T. SHERWOOD,
Acting Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT

IT:B:1
UVT-90D

Mr. James G. Enright et al., Executors, Estate of John M. Enright, Deceased, 75 Montgomery Street, Jersey City, New Jersey.

Tax liability for Taxable Year Ended December 31, 1934

Income Tax: Liability, $22,537.88. Assessed, $6,287.36. Deficiency, $16,250.52.

In making this determination of the income tax liability of John M. Enright, deceased, careful consideration has been given to the internal revenue agent's report dated October 28, 1936; to the protests dated December 16, 1936, April 15, 1937, April 27, 1937, and June 9, 1937; to the statements made at the conference held on April 15, 1937; and to the claim for refund filed on November 21, 1935.

If a petition to the United States Board of Tax Appeals is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Board in any redetermination of the tax liability. If a petition is not filed, the claim for refund
13 will be disallowed and official notice will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

A copy of this letter has been mailed to your representative, Mr. James D. Carpenter, Jr., 75 Montgomery Street, Jersey City, New Jersey, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	$39,295.31
Unallowable deductions and additional income:	
(a) Interest	961.67
Net income as disclosed by revenue agent's report dated July 27, 1936	40,256.98
(b) Income from partnership of McDermott, Enright, and Carpenter	42,911.32
Total	83,168.30
Nontaxable income and additional deductions	None
Net income adjusted	83,168.30

EXPLANATION OF ADJUSTMENTS

(a) Interest accrued on bonds in the amount of $961.67 was omitted from income. This amount has been included in accordance with section 42-1, Regulations 86, Revenue Act of 1934. (Additional tax of $267.62 on this amount paid to collector.)

(b) The indicated amount, $42,911.32, has been included in the gross income of the decedent as income accrued up to the date of his death, under the provisions of section 42 of the Revenue Act of 1934, the said amount representing the decedent's share of fees earned or partially earned by the old firm of McDermott, Enright, and Carpenter up to the date of his death as determined by Mr. James D. Carpenter, the surviving senior member of the firm.

14 COMPUTATION OF TAX

Net income adjusted		$83,168.30
Less:		
Personal exemption		1,000.00
Balance (Surtax net income)		82,168.30
Less:		
Interest on Liberty bonds	$156.32	
Dividends	3,382.54	
Earned income credit	1,400.00	
		4,938.86
Net income subject to normal tax		77,229.44
Normal tax at 4% on $77,229.44		3,089.18
Surtax on $82,168.30		19,475.74
Total tax		22,564.92
Less: Income tax paid at source		27.04
Correct income tax liability		22,537.88
Income tax assessed:		
Original, account #March, 230179, 1935	$6,019.74	
Additional, account #September 51146, 1936 list	267.62	
		6,287.36
Deficiency of income tax		16,250.52

15 Before United States Board of Tax Appeals

Amended answer

Filed May 3, 1939

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) and (2). Admits the allegations contained in paragraphs (1) and (2) of the petition.

(3) Admits that the taxes in controversy are Federal income taxes for the year ended December 31, 1934, as alleged in paragraph (3) of the petition, but denies all other allegations contained in said paragraph.

(4) Admits that prior to November 19, 1934, John M. Enright, James D. Carpenter, Jr., Howard C. Gilmour, Carl S. Kuebler, and Patrick A. Dwyer were partners engaged in the practice of the law at Jersey City, New Jersey, under the firm name of McDermott, Enright & Carpenter, and that on November 19, 1934, John M. Enright died as alleged in paragraph (4) of the petition but denies all other allegations of fact contained in said paragraph.

(5) to (14), inclusive. Denies the material allegations of fact contained in paragraphs (5) to (14), inclusive, of the petition.

(15)—(1) to (3), inclusive. Denies that the respondent erred as alleged in subparagraphs (1) to (3), inclusive, of paragraph (15) of the petition.

(15) (page 6). Denies the material allegations of fact contained in the second paragraph bearing No. (15) and appearing on pages 6 and 7 of the petition.

(16) and (17). Denies the material allegations of fact contained in paragraphs (16) and (17) of the petition.

(18) Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

16 Further answering the petition and by way of affirmative relief the respondent avers:

19. The respondent erred in that in determining the deficiency asserted in the notice of deficiency he included as earnings of decedent to the date of his death in the partnership of McDermott, Enright & Carpenter, the sum of $42,911.32, whereas he should have included therein an amount of not less than $46,293.75.

20. In support of the foregoing assignment of error, the respondent alleges the following facts:

The sum of $42,911.32, included in net taxable income as shown in the notice of deficiency on account of decedent's share of earnings of the partnership of McDermott, Enright & Carpenter represented an estimate shortly after the date of decedent's death. The actual collections made to date on account of said share of such earnings of decedent to date of his death equal the aggregate sum of $46,293.75. This sum should be included in taxable income instead of $42,911.32.

Wherefore, it is prayed that the appeal be denied, and that the tax liability of the petitioner be redetermined in that the respondent's affirmative issue as set forth in paragraphs 19 and 20 hereof, be sustained by the Board and the deficiency be redetermined accordingly. Claim is hereby asserted for the increased deficiency resulting from the decision of respondent's affirmative issue in his favor.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
E. O. HANSON,
Division Counsel,
J. RICHARD RIGGLES, Jr.,
Special Attorney, Bureau of Internal Revenue.

17 Before United States Board of Tax Appeals

Reply to amended answer

Filed May 6, 1939

The petitioners, Estate of John M. Enright, deceased, James C. Enright, Emma E. Neilson, and Mildred L. Enright, executors, by their attorney, James D. Carpenter, Jr., for their reply to the amended answer filed in the above-entitled appeal, aver as follows:

(1) to (18), inclusive. They join issue with respect to the matters alleged in paragraphs (1) to (18), inclusive, of the amended answer.

(19) They admit the allegation in paragraph (19) of the amended answer that the respondent included as earnings of decedent to the date of his death in the partnership of McDermott, Enright & Carpenter, the sum of $42,911.32, in determining the deficiency asserted in the notice of deficiency. They deny that the respondent should have included as earnings of the decedent to the date of his death in the partnership of McDermott, Enright & Carpenter an amount of not less than $46,293.75, or any part of such amount.

(20) They deny that the sum of $46,293.75 or any part thereof should be included in taxable income of the decedent. They admit all other material allegations of fact contained in paragraph (20) of the amended answer.

Respectfully submitted.

JAMES D. CARPENTER, Jr.,
Counsel for Petitioners,
75 Montgomery Street, Jersey City, New Jersey.

18 Before United States Board of Tax Appeals

Memorandum opinion

Rendered August 28, 1939

Docket Nos. 93754, 93755, 93756, 93757, 93758, 93813, and 97797

ESTATE OF JOHN M. ENRIGHT, DECEASED, JAMES G. ENRIGHT, EMMA E. NEILSON, AND MILDRED L. ENRIGHT, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

JAMES D. CARPENTER, JR., AND MRS. EMILY A. CARPENTER, HIS WIFE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

HOWARD C. GILMOUR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PATRICK A. DWYER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

19 CARL S. KUEBLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

JAMES D. CARPENTER, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ESTATE OF JOHN M. ENRIGHT, DECEASED, JAMES G. ENRIGHT, EMMA E. NEILSON, AND MILDRED L. ENRIGHT, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

James D. Carpenter, Jr., Esq., and Elmer J. Bennett, Esq., for the petitioners.

J. Richard Riggles, Jr., Esq., for the respondent.

MURDOCK. The Commissioner determined deficiencies in income tax as follows:

Docket No.	Taxpayer	Year	Amount
93754	Estate of John M. Enright	1934	$16,250.52
93755	James D. Carpenter, Jr. and Emily A. Carpenter	1934	276.24
		1935	3,163.89
93756	Howard C. Gilmour	1934	75.58
		1935	651.55
		1936	159.29
93757	Patrick J. Dwyer	1934	44.88
		1935	343.47
		1936	91.19
93758	Carl J. Kuebler	1934	19.84
		1935	354.39
		1936	98.61
93813	James D. Carpenter, Jr.	1936	827.79
97797	Estate of John M. Enright	1935	4,943.82

The Commissioner, in determining the deficiency for 1934 against the Estate of John M. Enright, included in income, under section 42 of the Revenue Act of 1934, $42,911.32, representing the deceased's share at the date of his death in income of a law partnership earned to that date but not collected. That action of the Commissioner is assigned as error by the petitioner in docket number 93754. The Commissioner, by amended answer, claims that the correct amount is not less than $46,293.75, the actual amount collected and distributed to the estate to the date of the hearing.

The Commissioner, as a precaution in case he was in error as to the estate of Enright, included in the income of the continuing partners, amounts collected and paid to the estate. He also included in the income of the estate for 1935 the amount received by the estate from the partnership in that year. He concedes that he erred in all of these cases if he was right in the first case mentioned.

The facts stipulated are found as stipulated.

John M. Enright died on November 19, 1934. He had been a partner in a law firm in Jersey City, New Jersey, up to the time of his death. The firm was upon a calendar year cash receipts basis. The partners were all upon a cash basis. The net income was distributable as follows:

John M. Enright	34½%
James D. Carpenter, Jr	34½%
Howard S. Gilmour	13%
Carl S. Kuebler	9%
Patrick A. Dwyer	9%

The partnership agreement provided that in case Enright died his interest would consist of his interest upon the above percentage basis in cash, accounts receivable and "the
21 earned proportion of the estimated receipts from unfinished business." The decedent by his will directed his executors to accept Carpenter's valuation of partnership items. The surviving partners formed a new partnership immediately after Enright died and continued the business. The new agreement provided that Carpenter was to estimate the earned portion of receipts from unfinished business for the purpose of paying the Enright estate.

Enright's interest in partnership cash at the date of his death was $4,143.81 and his interest in collectible accounts receivable at that time was $2,055.55. The partnership at that time was handling over 400 pending cases in which work had been done and on which additional work had to be done before the amount of fees to be charged could be determined and billed to clients. Carpenter estimated that the firm had earned by work upon those cases up to November 19, 1934, about $118,522.51 and that Enright's interest therein was $40,855.77. The $2,055.50 item and the $40,855.77 item or $42,911.32 were reported as a part of Enright's estate for state and federal estate tax purposes.

The share of Enright in cases being handled upon the basis of a fixed fee was $1,024.89 but those fixed fees were payable after his death upon a monthly or yearly basis. Almost all other cases were being handled under understandings with clients that the fee would be a reasonable amount for work done, taking into account, results, time and effort, and the amount involved. Only a few cases were being handled upon a contingent-fee basis and such cases Carpenter valued in his estimate at one dollar.

As the new firm made collections on old business it paid Enright's share to his estate.

The executors filed a return for Enright for 1934 and included his share of the partnership cash, $4,143.81. The Commissioner, in determining the deficiency, added $42,911.32, representing his share of accounts receivable and his share of estimated earnings to the date of his death.

22 The new firm, up to the date of the hearing, had collected $46,293.75 upon Enright's share of old business and had paid $45,965.15 to the estate.

The following facts are found from testimony of Carpenter:

The amount estimated as Enright's share of earned fees on unfinished business would not have been realized in full had the new firm not completed the business.

Enright was on a cash basis and did not receive any of the $42,911.32 in controversy. The question is whether it was prop-

erly included in his income under section 42 of the Revenue Act of 1934 which contains a special provision on the subject of income earned up to the death of a decedent. The provision is as follows:

"In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death * * *."

The purpose of the provision was to tax that income, earned but not received, which would otherwise escape taxation. It would not be taxable to the deceased, because never received by him; and it would not be taxable to his estate, because it would be capital to it. See discussion in Lillian O. Fehrman, Executrix, 38 B. T. A. 37. The effect of the provision was to require that the deceased be placed upon an accrual basis at the date of his death. The Commissioner has followed the statute in the case of Enright and has determined that $42,911.32 was an accruable item at that date.

The share of accounts receivable and the share in the fixed fee items were certainly accruable. The evidence does not show the situation in regard to the other items making up the $40,855.77 in sufficient detail to enable the Board to determine whether or not they were accruable. Some of them may have been sufficiently definite to permit an accrual, while others
23 may have been too indefinitet or contingent. We must decide the case upon the record before us. That record does not show that any of the estimated fees were too indefinite for accrual of the amount fixed by Carpenter and consequently we are unable to say that less than $42,911.32 was income under section 42. Cf. Gussie K. Barth, 35 B. T. A. 546. On the other hand, the evidence does not show that any greater amount was accruable on November 19, 1934. We are forced to leave the parties as we found them. The determination of the Commissioner in docket number 93754 is sustained and, in view of the concession of the respondent, the other issues need no consideration.

Decision will be entered under Rule 50.

Before United States Board of Tax Appeals

Decision

Entered November 21, 1939

It appears from the opinion in this case that no recomputation under Rule 50 was necessary since the determination of the

Commissioner was sustained. In view of this fact and after due consideration, it is

Ordered and decided, that at this docket number there is a deficiency of $16,250.52 for the calendar year 1934.

(Sgd.) J. E. MURDOCK,
Member, United States Board of Tax Appeals.

24 In United States Circuit Court of Appeals for the Third Circuit

B. T. A. No. 92754

Petition for review and assignments of error

Filed November 25, 1939

To the Honorable Judges of the United States Circuit Court of Appeals, for the Third Circuit:

Now come James G. Enright, Emma E. Neilson, and Mildred L. Enright, Executors of the Estate of John M. Enright, deceased, and respectfully show and charge as follows:

I. JURISDICTION

That the petitioners on review are James G. Enright, Emma E. Neilson, and Mildred L. Enright, Executors of the Estate of John M. Enright, deceased.

That the respondent on review is the Commissioner of Internal Revenue.

The petitioners filed a United States income tax return for John M. Enright, deceased, for the year ending December 31, 1934, and paid income taxes shown to be due thereon aggregating $6,287.36.

This is a proceeding for review by the United States Circuit Court of Appeals for the Third Circuit of the deter-
25 mination of the United States Board of Tax Appeals of August 18, 1939, and judgment thereon, which held that your petitioners were liable for a deficiency in income tax for the year aforesaid of $16,250.52, under Section 42 of the Revenue Act of 1934.

The tax return of your petitioners was filed in the office of the Collector of Internal Revenue at Newark, New Jersey, and the taxes were paid to such collector.

Jurisdiction is given to this Honorable Court in this case by United States Code, Title 26, Section 641.

II. NATURE OF THE CONTROVERSY

John M. Enright died November 19, 1934, a resident of Freehold, Monmouth County, New Jersey. He was senior member of the law firm of McDermott, Enright & Carpenter, which was engaged in the practice of law at 75 Montgomery Street, Jersey City, New Jersey. The partnership at the date of his death consisted of John M. Enright, James D. Carpenter, Jr., Howard C. Gilmour, Carl S. Kuebler and Patrick A. Dwyer.

The partnership agreement effective at the date of death provided that "the earnings of the firm distributable to the partners shall be determined annually on the basis of cash receipts and disbursements." The share of John M. Enright was 34½ percent. In the event of retirement of any member, by death or otherwise, it provided "that the interest of such retiring member shall consist of his interest on the above percentage basis in the net moneys then in the treasury of the firm, plus his like percentage in the outstanding accounts and the earned proportion of the estimated receipts from unfinished business." Said determination was to be made by joint agreement of the retiring member or his personal representative and the remaining senior partner as of the effective date of retirement.

The last will and testament of John M. Enright contained a provision directing his executors to accept the valuation of various items of business in the hands of the firm as fixed by his partner, James D. Carpenter, Jr.

26 Immediately upon the death of said John M. Enright, his surviving partners formed a new partnership, practicing law in the same offices under the firm name of McDermott, Enright & Carpenter.

The interest of John M. Enright at the date of his death in the cash on hand in the firm bank account was $4,143.81. This amount was included in the income tax return filed by the executors of the Estate of John M. Enright for the calendar year 1934 as income accrued to the date of death and the tax was paid thereon.

At the date of the death of John M. Enright, the other assets of the firm consisted of the following:

1. Accounts receivable, considered collectible, $5,948.12. The interest of John M. Enright therein at 34½ percent was $2,055.55.

2. Over 400 pending cases in which additional work had to be done before the amount of fees to be charged could be determined and the cases billed to the clients.

In order to determine for purposes of the Federal estate tax and the New Jersey transfer inheritance tax the probable value of the interest of the decedent in the partnership of McDermott,

Enright & Carpenter, an appraisal of all the aforesaid cases was made by James D. Carpenter, Jr., the surviving senior partner, and it was determined that the probable amount that had been earned in all pending cases by the firm to the date of the death of John M. Enright, including the probable realizable cash disbursements, aggregated $118,422.51, and that the interest of John M. Enright at his said 34½ percent was $40,855.77. This sum, together with the interest in the accounts receivable of $2,055.55, amounted to $42,911.32, which sum was reported in the Federal estate tax return and in the New Jersey transfer inheritance tax return as John M. Enright's interest in the business of the firm at the date of his death and taxes were assessed and paid on said amount.

27 Subsequent to November 19, 1934, the date of Mr. Enright's death, the interest of John M. Enright in the fees and disbursements collected on business of the old firm, earned to the date of his death, were collected as follows:

November 19, 1934, to December 31, 1934	$5,497.15
1935	24,942.52
1936	6,793.39
1937	5,578.51
1938	3,153.58
Total	45,965.15

These amounts were paid during the aforesaid years or paid in part during said years and in part during the early part of the following year by the successor firm of McDermott, Enright & Carpenter after it received the fees on the conclusion of the various cases. The amount paid the Enright Estate represented its 34½ percent interest in the respective fees. In fifty-five cases the fees actually collected by the successor firm were in excess of the appraised value and in twenty-two cases the fees were less than those estimated. The interest of decedent, to wit, 34½ percent, was paid on the amounts collected after they were received by the successor firm. No payments were made in advance of collection and the amount of the original appraisal was used solely for the purposes of determining the Federal estate tax and the New Jersey transfer inheritance taxes on decedent's net estate. It was stipulated at the time of the hearing before the Board of Tax Appeals that a total of $40,293.75 had been paid to the date of trial.

The aforesaid sum of $45,965.15 paid to the Estate of John M. Enright during the years 1934, 1935, 1936, 1937, and 1938 was not included in the income tax return filed by the Estate of John M. Enright for 1934 or any of said subsequent years. The income tax return for the firm of McDermott, Enright & Carpenter for such years showed the amounts paid to the

28 Estate of John M. Enright as payments in liquidation of the interest of John M. Enright in the old firm of McDermott, Enright & Carpenter.

In 1935, 1936, 1937, and 1938 the Estate of John M. Enright filed information returns and the individual executors, the beneficiaries of John M. Enright in equal shares (with certain exceptions as to Mildred L. Enright), have not reported the moneys received from McDermott, Enright & Carpenter in liquidation of the interest of Mr. Enright in the firm, as income.

On March 5, 1938, the Commissioner of Internal Revenue advised decedent's executors of a deficiency of $16,250.52 of income tax for the taxable year ending December 31, 1934. The statement annexed to said advice showed that the Commissioner increased the decedent's income for the calendar year 1934 as follows:

"Explanation of Adjustments

* * * * *

"(b) The indicated amount, $42,911.32 has been included in the gross income of the decedent as income accrued up to the date of his death, under the provisions of Section 42 of the Revenue Act of 1934, the said amount representing the decedent's share of fees earned or partially earned by the old firm of McDermott, Enright & Carpenter up to the date of his death, as determined by Mr. James D. Carpenter, the surviving senior member of the firm."

The amount of $42,911.32 was the esitmated amount of decedent's interest in the firm as appraised for the purposes of Federal estate tax and New Jersey transfer inheritance tax.

Your petitioners promptly and within the time allowed by law filed with the United States Board of Tax Appeals a petition praying that the said deficiency tax liability be redetermined, set aside and vacated.

On the trial before the Board of Tax Appeals, most of the facts aforesaid were stipulated and the testimony of James D. Carpenter, Jr., was introduced.

29 In due time, after the submission of briefs by counsel for the respective parties, the Board of Tax Appeals on August 28, 1939, filed its opinion and determination, affirming the determination of the Commissioner of Internal Revenue.

This appeal is taken from said portion of the determination of the United States Board of Tax Appeals aforesaid dated August 28, 1939, which affirms the Commissioner of Internal Revenue in his determination made in this cause on Docket No. 93754.

No appeals are taken from decision in the cases bearing the Docket Nos. 93755, 93756, 93757, 93758, 93813, and 97797 referred to in the said decision, which cases were consolidated and tried with this case Docket No. 93754.

III. ASSIGNMENTS OF ERROR

Petitioners allege that the United States Board of Tax Appeals erred in the following respects:

(1) In holding that the sum of $42,911.32, being the amount estimated as decedent's interest in the uncollected outstanding accounts and pending cases in the partnership of McDermott, Enright & Carpenter, for the purpose of fixing the value of decedent's gross estate for Federal estate tax and New Jersey transfer inheritance tax purposes, was taxable income within the meaning of Section 42 of the Revenue Act of 1934.

(2) Because the Board found that the effect of Section 42 of the Revenue Act of 1934 was to require that decedent be placed upon an accrual basis at the date of death, whereas the said Board found as a fact that decedent was on a cash basis prior to the time of death and did not receive in his lifetime any of said sum of $42,911.32 in controversy in this appeal.

(3) Because said Board erroneously determined that the sum of $42,911.32 was income accrued at the date of death of John M. Enright, although it found as a fact that the amount estimated as decedent's share of the fees of McDermott, Enright & Carpenter on unfinished buisness at the time of his death, to wit, $40,855.77 thereof, would not have been realized had a new firm not been organized and completed the business.

(4) Because the Board did not hold as a matter of law that no income accrued to John M. Enright from his partnership of McDermott, Enright & Carpenter on outstanding accounts of said firm or pending business until said accounts and fees were in fact paid by clients of the partnership.

(5) Because said Board did not hold that decedent had no income accrue to him from the partnership of McDermott, Enright & Carpenter on the unfinished law business in the hands of the partnership until such business was concluded, the amount of fee determined either by Court order, in the case of business handled for the courts, or by agreement with clients in the case of business handled for clients, and until the money was collected by the partnership, both the partnership and decedent being on the cash basis.

(6) Because Section 42 of the Revenue Act of 1934, under which the tax in controversy was levied, is null and void in that

it is not a tax on income within the meaning of the Sixteenth Amendment and was not laid in proportion to the census within the meaning of Article I, Section IX, paragraph 4 of the Constitution of the United States.

(7) Section 42 of the Revenue Act of 1934, as construed by the Board of Tax Appeals, is in conflict with the Fifth Amendment to the Constitution of the United States and is null and void for the reasons:

(a) That said section attempts to define as income, taxable at the date of said taxpayer's death, the estimated present money value of services performed by a partnership, of which de-
31 ceased was a member, when in fact the reasonable value of the services of the partnership are not in fact income and do not become such even to the partnership until the completion of the services by the succeeding partnership over a period of years in the future;

(b) said section attempts to tax to a deceased partner his share of such estimated present money value as income accrued to the date of his death, yet income taxes as to all other members of the partnership are assessed as of the date when the partnership receives and distributes the proceeds of services rendered; and

(c) said section is arbitrary, harsh, and confiscatory in that, where members of a partnership are all on a cash basis and one dies it makes the fact of death create the interest in the partnership of the deceased partner as taxable income, although the interest of the surviving partner or partners is not taxable income until the partnership assets are liquidated.

(8) Section 42 of the Revenue Act of 1934, as construed and applied by the Board of Tax Appeals, violates the Fifth Amendment to the Constitution of the United States and is null and void in that it attempts to create income and impose a tax thereon upon what is in fact corpus.

(9) The Board of Tax Appeals erred in affirming an income tax assessed upon the reasonable value of work done rather than upon income either received or accrued.

(10) The tax under review is null and void in that it is an attempted levy of an income tax upon the reasonable value of work done by a law partnership rather than on income received by or accrued to a deceased member of said partnership.

(11) Section 42 of the Revenue Act of 1934 is null and void as violative of the Fifth and Sixteenth Amendments to the Constitution of the United States in that the tax imposed by
32 said section falls solely because of the death of the taxpayer, which event under the statute arbitrarily transfers the taxpayer from a cash basis, under which he had been oper-

ating in his lifetime, to an accrual basis, in order to create income and tax that which was in fact not income prior to death, and upon death in fact became corpus.

Wherefore your petitioners pray that the judgment and determination of the United States Board of Tax Appeals may be reviewed by the United States Circuit Court of Appeals for the Third Circuit; that a transcript of the record be prepared in accordance with the law and rules of said court and transmitted to the clerk of said court for filing, and that the determination of the Commissioner of Internal Revenue and United States Board of Tax Appeals aforesaid may be reversed and set aside for the reasons aforementioned.

JAMES D. CARPENTER, JR.,
Attorney for and of Counsel with Petitioners.

Dated November 24, 1939.

33 [*Duly sworn to by James G. Enright et al.; jurat omitted in printing.*]

34 Before United States Board of Tax Appeals

Statement of evidence; stipulation of facts; agreement as to Statement of Evidence

Filed January 20, 1940

At the hearing before the Board held at the United States Court House, New York, on May 3, 1939, before Hon. J. E. Murdock, Member of the United States Board of Tax Appeals.

The appearances were as follows: James D. Carpenter, Jr., and Elmer J. Bennett, 75 Montgomery Street, Jersey City, N. J., appearing on behalf of petitioners; J. Richard Riggles, Jr. (Hon. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Commissioner of Internal Revenue, respondent.

The stipulation of facts as agreed upon by counsel for the respective parties was presented to the Member.

JAMES D. CARPENTER, Jr., a witness on behalf of the petitioners, testified as follows:

I went with the firm of McDermott & Enright in the capacity of managing clerk in 1909, and became a partner in 1912, and was a partner of Mr. Enright until he died, November 19, 1934, excepting during the time that he was in Washington as a member of the War Trade Board during the war.

I started to appraise all the matters in the office belonging to John M. Enright in his capacity as a partner, the day that he died, but I did not finish it until nearly a year later. This appraisal was made for the purposes of Federal estate tax and the State of New Jersey transfer inheritance tax on his estate. We had to do this in order to know what his gross estate was on which to pay such taxes.

35 Shortly after Mr. Enright's executors qualified, I had a conversation with them and we made a survey of what his assets were. I discussed with them the provisions of his will regarding the liquidation of the partnership and asked them how they preferred to have the liquidation carried out. I told them how we had liquidated the interest of another member in 1921, and we agreed that the interest of John M. Enright in the firm should be liquidated case by case, and the amount of his interest should be paid to them from time to time at the convenience of the successor firm, and that is what we have done.

I know from my knowledge of the business in the office and how it was handled and what has happened that had we not continued the business with considerable success and good fortune, we would not have realized the amount we have ultimately realized, nor could we have realized the amount I estimated. Some of the firm business was the representation of receivers and trustees executors, and administrators, and allowances in our State in such matters are subject to the approval of the courts, in fact, they are made by the courts. I am perfectly confident in those cases had the successor firm not been formed to carry on the business and had we sent out bills or applied for allowances to date, we never could have realized and the court would not have ordered any such per diem rate as we ultimately received, and I am confident that hard work and perhaps some good fortune increased the amount anticipated. In many cases it indicates that we received a per diem rate over what I had originally estimated.

Mr. Enright and all his partners were in 1934 and always have been on a cash basis and none of them has ever been on an accrual basis. So is the firm.

CROSS-EXAMINATION

The firm of McDermott, Enright & Carpenter has two loose-leaf ledgers, a cash book, and check book. These records do not show any capital accounts or capital interest

36 for the individual partners. No goodwill is shown on the books. The only intangibles of any nature are accounts receivable. The firm had no money nor any investments in stocks

or bonds. It had cash in bank, accounts receivable, and the decedent's interest in unfinished business in the office as of the date of decedent's death. It was only on the accounts receivable and his interest in the unifinished cases in the office on which I estimated the value of Mr. Enright's interest for the purposes of the estate taxes. There was no invested capital in the estimated amount of $42,000, in the sense that you mean money put out at interest, but I consider that the investment of a man's time and services is capital, a capital element down to the date of his death. The business which for the purposes of Federal estate and state transfer inheritance taxes I considered as worth $42,000, includes only decedent's interest in the business which was in the office at the date of death and does not include any cases that came into the firm subsequent to his death. The cases that were in the office at the date of Mr. Enright's death had been in the office for a longer or shorter period. Some work had been done on all the cases and I took them case by case as to the amount of work that had been done upon them and the time that had been spent upon them. There were approximately four hundred matters in the office, and there were all sorts of arrangements as to how they were being handled. Some of them were on appointment by the court where we were appointed to represent receivers, trustees, and whatnot. In some cases, administrators, and in those matters the fees were fixed by order of the court after the work had been done. There were a few cases where we were working on retainers payable by the month or by the year, none being payable at the time of death. There were others that we were handling on a per diem basis. There were others where we would be paid a reasonable fee for the work done, taking into consideration and into account the time devoted to the case,
37 the amount involved and the success. A few were being handled on a contingent fee basis. There were a number that I appraised at a dollar, because I would not have given more than a dollar for them. The number of strictly contingent cases I figured as only four or five. They were very few. Our experience in them was not good and I do not approve of handling cases on a contingent fee basis. All other cases in the office were being handled on the quantum meruit basis. Except those where we were appointed by the court—trustees and whatnot, practically everything was on the quantum meruit basis, being paid a reasonable fee for services rendered, depending upon the time devoted to the case, the amount involved in the case and the result obtained. Practically everything in the office was on that basis.

I completed the appraisal in November 1935. I tried to make it just as accurate as I could, because I did not want to make a mistake about it and I wanted to be able to have something

which would be correct and accurate for checking by the transfer inheritance and Federal estate tax authorities, and I took nearly a year from the time of Mr. Enright's death to complete that appraisal, trying to get the benefit of all the closed cases, which made it more accurate, my idea being accuracy. During that time we made collections in some of the cases and gained by that experience, and each closed case aided me in determining the appraisal value of $42,000, to the extent that the money was in hand and I could tell what the case was worth. As to everything else in the office that was unfinished, I could do no more than make an approximation or a guess even by the first of November 1935, if by that time. If by the first of November 1935, we closed a case and the fee was paid, then I could tell exactly how much it worked out per diem and calculate the days to Mr. Enright's death and the days subsequent and be very accurate, but I could not tell, necessarily, on the date of his death as to cases not closed.

38 The appraisal was $42,911.32. The collections subsequent have shown a larger amount, spreading over the period to the first of this year, 1939. The amount collected as Mr. Enright's share to date is $45,965.15, and we are not done yet. There are other cases that have not been completed, totalling thirty or forty. The outstandings unpaid are small. I can not give you much of an approximation of it at this time, which is four and one-half years after Mr. Enright's death. I am still hopeful that I will wind up advantageously one or two matters, but that is not much more than a hope. If I depend on the amount estimated at the date of death, the amount appraised on those few extra cases is small.

Stipulation of facts

It is hereby agreed between counsel for all the above-named petitioners and counsel for the respondent as follows:

1. That all of the above cases shall be tried together and that the facts as herein stipulated shall be admitted in all of said cases, provided however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true.

2. John M. Enright, a resident of Freehold, Monmouth County, New Jersey, died testate November 19, 1934.

He was senior member of the law firm of McDermott, Enright & Carpenter, which was engaged in the practice of law at 75 Montgomery Street, Jersey City, New Jersey.

The partnership at the date of his death consisted of John M. Enright, James D. Carpenter, Jr., Howard C. Gilmour, Carl S. Kuebler, and Patrick A. Dwyer.

3. The partnership agreement which was in effect at the date of the death of John M. Enright was dated January 14, 1928, and contained the following provisions which are material in this controversy:

39 "(2) The earnings of the firm distributable to the partners shall be determined annually on the basis of cash receipts and disbursements.

"All receipts subsequent to the date hereof shall be considered as income subject to this agreement, regardless of when earned, and all liabilities of McDermott, Enright & Carpenter paid subsequent to the date hereof shall be considered as expenses of the firm and shall be deducted from the receipts, regardless of when such liabilities were contracted.

* * * * *

"(4) The net income of the firm shall be distributed as follows:

John M. Enright	34½%
James D. Carpenter, Jr.	34½%
Howard C. Gilmour	13%
Carl S. Kuebler	9%
Patrick A. Dwyer	9%"

(as amended by supplemental contract dated January 2, 1934.)

* * * * *

"(5) In the event of the retirement through death or otherwise of the present members of the firm, Messrs. Enright and Carpenter, or either of them, it is agreed that the interest of such retiring member shall consist of his interest on the above percentage basis in the net monies then in the treasury of the firm, plus his like percentage in the outstanding accounts and the earned proportion of the estimated receipts from unfinished business. The value of such outstanding accounts and unfinished business shall be determined if possible as of the effective date of such retirement, by the joint agreement of such retiring member or his personal representative, and the senior remaining partner. * * *

40 "The amount so determined shall be paid by the remaining members who elect to carry on the firm, in equal monthly instalments, within eighteen months from the date of such retirement.

"(6) In all events the books of account and office records of the firm shall be and remain the property of the surviving members carrying on the firm, and in no event shall any member or

the personal representative of any deceased member of the firm be entitled to any judicial accounting of the affairs of the firm."

4. The last will and testament of John M. Enright, probated at Freehold, New Jersey, contained the following provision:

"Eighth: In settling my interest in the law firm of McDermott, Enright & Carpenter, I direct my executors to accept the valuation of the various items of business in the hands of the firm as fixed by my partner James D. Carpenter, Jr., and to accept payment for my interest therein upon such terms of credit as my said partner may deem reasonably necessary for the liquidation thereof out of the business."

5. Immediately after the death of the said John M. Enright his surviving partners formed a new partnership, practicing law in the same offices as the preceding firm, under the firm name of McDermott, Enright & Carpenter.

Paragraph 2 of the new partnership agreement provides as follows:

"Pursuant to the provisions of the Will of John M Enright, who died this day, and the provisions of paragrapn 5 of the firm agreement of January 14, 1928, the earned proportion of the estimated receipts from unfinished business of the former firm
41 shall be determined by the said James D. Carpenter, Jr., whose decision thereon shall be binding and conclusive upon the parties hereto.

"It is mutually agreed that the amount so determined by the said Carpenter shall be paid to the estate of John M. Enright as soon as practicable out of all receipts of the firm, whether in liquidation of business of the former firm or from new business of this firm. So much of the net earnings of this firm from and after the date hereof as equals thirty-four and one-half percent (34½%), (being the interest of John M. Enright as of the date of his death), shall be considered as earned in liquidation of the business of the old firm and so paid, whether or not received from liquidation of business of the old firm. (It is the purpose of this provision to avoid the trouble and expense of running two sets of books, one, the liquidation of the old firm and its business, and the second, a new set of books for this firm allocating strictly the monies received in each firm, and likewise to avoid charging against the interest of John M. Enright expense for overhead and other costs of liquidating his interest in the old firm, which would entail the employment of a bookkeeper or accountant, the opening of separate bank accounts, etc.)

* * * * * *

"The net income of the firm shall be distributed as follows:

"James D. Carpenter, Jr., fifty-one percent (51%);

"Howard C. Gilmour, twenty percent (20%);
"Carl S. Kuebler, fourteen percent (14%);
"Patrick A. Dwyer, fifteen percent (15%).

* * * * *

"The amount distributable to all partners during the continuance of this agreement, as well as the amount distributable to Messrs. Gilmour, Kuebler, and Dwyer, or any of them, in the event of their respective retirement from the firm, shall be
42 determined from time to time by James D. Carpenter, Jr., and the amount so determined by him shall be final and conclusive upon all parties hereto."

6. The interest of John M. Enright at the date of his death in the cash on hand in the firm bank accounts was $4,143.81.

In the income tax return filed by the executors of John M. Enright for the calendar year 1934, said sum of $4,143.81 was included as income accrued to the date of death and the tax was paid thereon, although said sum was not actually distributed by the successor firm to the executors until February 26, 1935.

7. The other assets of the firm at the date of the death of Mr. Enright consisted of the following:

(1) Accounts receivable considered collectible $5,948.12, the interest of John M. Enright therein at 34½ percent, being $2,055.55.

(2) Over 400 pending cases in which work had been done and on which additional work had to be done before the amount of fees to be charged could be determined and the cases billed to clients.

8. James D. Carpenter, Jr., the surviving senior partner of the former firm of McDermott, Enright & Carpenter, appraised all of the cases in the office at the date of Mr. Enright's death and determined that the probable amount that had been earned by the firm to the date of the death of John M. Enright, including the probable realizable cash disbursements, aggregated $118,422.51, and that the interest of John M. Enright in said estimated value, at 34½ percent thereof, was $40,855.77.

The aggregate of Mr. Enright's interest in the accounts receivable of $2,055.55, plus the estimated amount of his interest in the unfinished cases in the firm of $40,855.77, was $42,911.32,
43 which sum was reported in the Federal Estate Tax Return and in the New Jersey Transfer Inheritance Tax Return as John M. Enright's interest in the business of the firm to the date of his death.

9. The firm had nine matters pending in the office as of the date of Mr. Enright's death in which work was being done on a fixed fee basis, and Mr. Enright's share of the amounts earned in

said matters to the date of his death was $1,024.89 (which amount is included in said sum of $42,911.32). In none of these matters, however, were the fees payable at the date of death but they were payable on a per month or per annum basis at future dates.

Practically all other pending matters in the office of the firm were being handled on the basis of the firm being paid a reasonable fee for the work done, taking into account the amounts involved, the results accomplished for the clients, and the time and effort devoted to the cases. A few cases were being handled for clients on a contingent fee basis in which the amount of fee ultimately realizable depended solely upon success.

The amounts payable to the firm upon the completion of the business also depended upon the client being satisfied with the amount of fee charged.

In determining that the value of the pending unfinished business of the firm was $118,422.51, all contingent cases in the office were valued at one dollar each.

10. The executors of the estate of John M. Enright are his brother and two sisters.

It was agreed between the executors and James D. Carpenter, Jr., that the estimate of decedent's interest in the firm accounts of $42,911.32 was to be used for the purposes of Federal estate and New Jersey transfer inheritance tax returns and that the amount ultimately realizable for the estate as Mr. Enright's earned proportion at date of death in the unfinished business of the firm might ultimately be either greater or less than said estimate.

44 11. The firm of McDermott, Enright & Carpenter, John M. Enright, the Estate of John M. Enright, and all of the individual partners in the firm of McDermott, Enright & Carpenter filed their income tax returns on the cash basis for the taxable years under consideration.

12. Between November 19, 1934 (the date of Mr. Enright's death), and December 31, 1934, the interest of John M. Enright in the fees and disbursements collected on business of the old firm earned to the date of Enright's death amounted to $5,497.15. This amount was paid his executors March 25, 1935.

During the calendar year 1935 the firm of McDermott, Enright & Carpenter collected fees in 208 cases that were in the office at the date of death of John M. Enright and 34½ percent of the portion of such fees earned to the date of Mr. Enright's death (plus his share of the disbursements made by the firm to the date of his death), aggregated $24,942.52. Said sum of $24,942.52 was paid to his executors as follows:

March 25, 1935	$2,698.24
November 18, 1935	10,000.00
February 11, 1936	10,000.00
August 28, 1936	2,244.28
	$24,942.52

In the year 1936 the firm of McDermott, Enright & Carpenter collected fees in ninety-seven cases that were in the office at the date of death of John M. Enright and 34½ percent of the portion of such fees earned to the date of Mr. Enright's death (plus his share of the disbursements made by the firm to the date of his death) aggregated $6,793.39. Said sum of $6,793.39 was paid to his executors as follows:

November 9, 1936	$5,972.84
February 3, 1937	820.55
	$6,793.39

45 In the year 1937 the firm of McDermott, Enright & Carpenter collected fees in twenty-eight cases that were in the office at the date of death of John M. Enright and 34½ percent of the portion of such fees earned to the date of Mr. Enright's death (plus his share of the disbursements made by the firm to the date of his death) aggregated $5,578.51. Said sum of $5,578.51 was paid to his executors as follows:

July 7, 1937	$4,905.54
May 24, 1938	672.97
	$5,578.51

In the year 1938 the firm of McDermott, Enright & Carpenter collected fees in twenty-seven cases that were in the office at the date of death of John M. Enright and 34½ percent of the portion of such fees earned to the date of Mr. Enright's death (plus his share of the disbursements made by the firm to the date of his death) aggregated $3,153.58. Said sum of $3,153.58 was paid to his executors as follows:

May 24, 1938	$2,068.53
December 6, 1938	998.75
February 2, 1939	86.30
	$3,153.58

The total amount paid to the estate of John M. Enright, deceased, in liquidation of his earned proportion of the receipts from business that was in the office at date of death, aggregates $45,965.15 to date.

13. In the partnership returns of income (Form 1065), filed by McDermott, Enright & Carpenter, Mr. Enright's distributive share of net income is reported is Schedules B as follows:

46

1934

John M. Enright, Freehold, N. J., died November 19, 1934:		
34½% of net income of business transacted and paid to firm before November 19, 1934	$26,568.81	
34½% of net income of business transacted before November 19, 1934, and paid to firm after November 19, 1934, to and including December 31, 1934 (Capital to Estate in liquidation)	3,936.40	
		$30,505.21

1935

Estate of John M. Enright, Freehold, N. J., 34½% of net income of business transacted before November 19, 1934, and paid to firm during calendar year 1935; capital to Estate in liquidation	24,942.52

1936

Estate of John M. Enright, 34½% of receipts from business transacted before November 19, 1934 (date of death), and paid to firm during calendar year 1936: capital to Estate in liquidation	6,793.39

14. The estate of John M. Enright filed an income tax return for the calendar year 1935 and did not return the amount received from the firm of McDermott, Enright & Carpenter, as income.

47 In subsequent years the estate of John M. Enright has filed information returns and the individual executors (the beneficiaries of John M. Enright in equal shares, with certain exception as to Mildred L. Enright) have not reported the monies received from McDermott, Enright & Carpenter in liquidation of Mr. Enright's interest in the firm, as income.

15. As each case was closed and the fee paid, Mr. Carpenter has reexamined the charge sheets to determine whether the amount he originally determined as the interest of John M. Enright therein to the date of his death was correctly stated.

In fifty-five separate cases, the amount determined to be due to Mr. Enright at the date of his death was increased, whereas in twenty-two cases the amount estimated to be due to Mr. Enright to the date of his death was decreased.

Thirty-five cases that were in the office of McDermott, Enright & Carpenter at the date of Mr. Enright's death are still pending unfinished.

Bills receivable aggregating $2,166.70 have been determined as uncollectible. Some of these bills receivable were on the books of the firm prior to Mr. Enright's death and others have been rendered in cases closed since his death.

At the present time, bills rendered since November 19, 1934, considered collectible, total $100, in which Mr. Enright's interest is 34½ percent.

From January 1, 1939, to date, the firm of McDermott, Enright & Carpenter has collected fees in six cases that were in the office at the date of death of John M. Enright and 34½ percent of the portion of such fees earned to the date of Mr. Enright's death (plus his share of the disbursements made by the firm to the date of his death) aggregates $328.60. Said sum has not, however, to May 1, 1939, been paid over to the executors of his estate by the firm.

Between the date of Mr. Enright's death and December 31, 1938, monies were received by the firm of McDermott, Enright & Carpenter in nine matters that were not on the
48 books of the firm at the date of Mr. Enright's death, and in which the files had been placed in storage. One of these matters was the return of part of a contribution toward a public investigation; two were the payment of the firm's share of costs on old judgments, and six involved the return of balances of deposits that had been advanced by the firm years before to clerks and marshals. Mr. Enright's estate was paid 34½ percent of all such amounts.

16. The liquidation of the interest of John M. Enright in the firm of McDermott, Enright & Carpenter has resulted as follows:

Amount estimated for estate and transfer inheritance tax purposes as the value of his interest—	
in outstanding accounts receivable	$2,055.55
in value of work in process	40,855.77
	42,911.32
Amount actually paid estate:	
March 25, 1935	8,195.39
November 18, 1935	10,000.00
February 11, 1936	10,000.00
August 28, 1936	2,244.28
November 9, 1936	5,972.84
February 3, 1937	820.55
July 7, 1937	4,905.54
May 24, 1938	672.97
May 24, 1938	2,068.53
December 6, 1938	998.75
February 2, 1939	86.30
	45,965.15
Six cases closed and bills paid since January 1, 1939, in which the interest of Mr. Enright's estate at 34½ percent is	328.60
Thirty-five cases still pending unconcluded. Interest in good accounts receivable aggregating $100, 34½ percent	34.50

49 17. The successor firm of McDermott, Enright & Carpenter did not buy the decedent's interest in the former firm from the estate of John M. Enright but paid his estate, after it was received, his percentage (34½ percent) of outstanding accounts collected and his earned proportion of unfin-

ished business after the fees were collected by the firm, and paid decedent's executors from time to time exactly what Mr. Enright was entitled to on strict liquidation making no deductions from such amount. No payments were made out of any receipts from new business of the new firm.

ELMER J. BENNETT,
Counsel for All Petitioners.
J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

Order approving statement of evidence

Approved and ordered filed this twentieth day of January, 1940.

(Sgd.) C. R. ARUNDELL,
Member.

50 Before United States Board of Tax Appeals

Agreement between counsel as to the statement of evidence, stipulation of facts and record on appeal

Filed January 20, 1940

Counsel for the respective parties do hereby agree on the foregoing statement of evidence.

We further agree that the foregoing copy of stipulation of facts is a true and correct copy of the stipulation heretofore made between counsel for the respective parties and filed with the Board.

We further agree that the Clerk of the Board of Tax Appeals shall certify to the Clerk of the United States Circuit Court of Appeals for the Third Circuit as the record on appeal in this matter the following:

(1) The docket entries of proceedings before the Board.
(2) Pleadings before the Board.
(3) Opinion and decision of the Board.
(4) Petition for review.
(5) The within statement of evidence and stipulation of facts.

JAMES D. CARPENTER, JR.,
Attorney for and of Counsel With Petitioners.
J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, of Counsel With Commissioner of Internal Revenue.

51 [Clerk's certificate to foregoing transcript omitted in printing.]

52 In United States Circuit Court of Appeals for the Third Circuit

October Term, 1939

No. 7320

ESTATE OF JOHN M. ENRIGHT, DECEASED, JAMES G. ENRIGHT, EMMA E. NEILSON, AND MILDRED L. ENRIGHT, EXECUTORS, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Minute entry of hearing

And afterwards, to wit, the 19th day of March 1940, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, and Honorable Charles Alvin Jones, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of June 1940, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

53 In United States Circuit Court of Appeals for the Third Circuit

No. 7320. October Term, 1939

ESTATE OF JOHN M. ENRIGHT, DECEASED, JAMES G. ENRIGHT, EMMA E. NEILSON, AND MILDRED L. ENRIGHT, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review From the United States Board of Tax Appeals

Opinion

Filed June 17, 1940

Before BIGGS, MARIS, and JONES, Circuit Judges

MARIS, Circuit Judge: This is a petition to review a decision of the Board of Tax Appeals. Section 42 of the Revenue Act

of 1934 provides, inter alia, that "In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period." The question now raised is whether, in the case of a deceased
54 taxpayer who was a member of a partnership which kept its accounts and made its returns on a cash basis, there must be included in the decedent's return his share in partnership income earned but not yet received by the partnership in cash or reported in its income tax return and not distributable to him under the partnership agreement.

John M. Enright, the petitioners' decedent, was a member of a partnership of lawyers which kept its accounts and made its tax returns on the cash receipts and disbursements basis. Their partnership agreement provided that the earnings of the firm distributable to the partners should be determined annually on the basis of cash receipts and disbursements. Enright also made his returns on the cash basis. When he died on November 19, 1934, his distributable interest in the partnership's cash on hand was $4,143.81, and this was reported in the income tax return filed for him for the year 1934 as income accrued to him from the partnership, in addition to the income actually received by him from the firm during that year. It appeared that his interest in the collectible accounts receivable of the firm was $2,055.55 and in fees earned in whole or in part but not yet billed to or received from clients was $40,855.77. This sum of $42,911.32 the Commissioner added to the decedent's taxable income under Section 42 as an amount accrued up to the date of his death. The Board of Tax Appeals upheld the Commissioner. We think it erred in so doing.

The Board said in its memorandum opinion that the effect of the provision of Section 42 of the Revenue Act which we have quoted above "was to require that the deceased be placed upon an accrual basis at the date of his death." We agree that this was its effect. It follows that the decedent's taxable income should have been computed in the same way it would have been had he been alive and regularly making his returns on the accrual basis.

We think the Board fell into error in failing to treat the partnership as a tax computing unit separate from its member,
55 Enright. That the Revenue Act requires that a partnership be so treated is clear from its provisions for the computing of partnership income and the filing of partnership

returns and has been recognized by the courts.[1] Thus a partnership may make its return for a taxable year different from that of its members,[2] and it may likewise make its returns upon an accounting basis different from that used by the individual partners.[3]

Section 182 of the Revenue Act provides that "There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year." This is in effect a direction that even though a partner is on the cash basis of accounting he must nevertheless use the accrual method in accounting for his income from the partnership. But the partnership income which accrues to him and for which he must account is only that shown to be distributable to him by the partnership return prepared pursuant to the partnership agreement, since it is only that distributable income which he has the right to receive. "Keeping accounts and making returns on the accrual basis, as distinguished from the cash basis, import that it is the right to receive and not the actual receipt that determines the inclusion of the amount in gross income. When the right to receive an amount becomes fixed, the right accrues." Spring City Co. v. Commissioner, 292 U. S. 182, 184.

In the present case under the partnership agreement as reflected in the partnership accounts and returns Enright had the right to receive only his proportionate share of the cash receipts of the firm. Of these only $4,143.81 remained distributable to him at his death. We think it is clear from what has been said that this sum represented the partnership income accrued
56 to him up to the date of his death within the meaning of Section 42 of the Revenue Act. In our opinion that section did not require the inclusion as "amounts accrued" of the uncollected accounts receivable and unbilled fees which under the partnership's agreement and its accounting method were not distributable to him. The only previous consideration of this question which we have found appears in an article entitled "Accruals to Date for Income Tax Purposes" by Charles C. Parlin appearing in 87 U. of Pa. Law Review, p. 295. After a full discussion of the problem the author reaches the same conclusion to which we have come.

The decision of the Board of Tax Appeals is reversed.

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[1] Guaranty Trust Co v. Commissioner, 303 U. S. 493; Johnson v. Commissioner, 86 F. 2d 732, cert. den. 301 U. S. 683; Archbald v. Commissioner, 27 B. T. A. 837, aff. 70 F. 2d 720, cert. den. 293 U. S. 594.

[2] Sec. 188, Revenue Act of 1934.

[3] Truman v. United States, 4 F. Supp. 447; Fritz Hill v. Commissioner, 22 B. T. A. 1079; W. J. Burns v. Commissioner, 12 B. T. A. 1209; Appeal of Percival H. Truman, 3 B. T. A. 386.

Dissenting opinion

BIGGS, Circuit Judge (Dissenting): I must dissent respectfully from the opinion expressed by the majority of the court for the following reasons.

Section 42 of the Revenue Act of 1934 is clear and explicit. It provides, among other things, that upon the death of a taxpayer there shall be included in computing net income for the taxable period in which falls his death, "amounts accrued up to the date of his death, if not otherwise properly includible in respect of such period or a prior period." The purpose of Congress in enacting the Statute also is plain.[4] It was to tax income accrued prior to the death of a decedent who was on a cash basis, such income frequently having been held by the courts to be received by the estate as capital.

The majority seems to me to interpose an entirely fictitious barrier to the operation of Section 42. They say that because Enright, alive, could not have received his proportionate part of the partnership income until distribution of it was made in accordance with the partnership agreement, the income here sought to be taxed cannot be treated as accrued up to the date
57 of his death, relying upon Section 182 of the Revenue Act. Enright is dead, however, and the question for our determination is whether the income here taxed "accrued up to the date of his death." An examination of the partnership agreements, particularly paragraph 5 of the supplemental contract entered into by the partners upon January 2, 1934, as well as the eighth item of Enright's will, the partnership agreement entered following Enright's death, and Revised Statutes of New Jersey 42:2–24, makes it clear that the sums taxed by the decision of the Board were intended by the interested parties to be treated as accrued up to the date of Enright's death. Assuming that Section 182 of the Revenue Act is entitled to the interpretation given to it in the majority opinion, none the less I cannot conclude that such an interpretation is pertinent to the issue at bar in the light of the agreements and course of conduct between Enright and his partners.

I conclude that the case at bar is governed by the decisions of the Supreme Court in Bull v. United States, 295 U. S. 243, 254, and in Guaranty Trust Company v. Commissioner, 303 U. S. 493. The decision of the Board of Tax Appeals should be affirmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[4] See H. Rep. No. 704, 73d Cong., 2d Sess., p. 24, and S. Rep. No. 558, 73d Cong., 2d Sess., p. 28.

58 In United States Circuit Court of Appeals
For the Third Circuit

No. 7320. October Term, 1939

ESTATE OF JOHN M. ENRIGHT, DECEASED, JAMES G. ENRIGHT, EMMA E. NEILSON AND MILDRED L. ENRIGHT, EXECUTORS, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

Filed June 17, 1940

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby reversed.

Philadelphia, June 17, 1940.

ALBERT B. MARIS,
Circuit Judge.

[File endorsement omitted.]

59 [Clerk's Certificate to foregoing transcript omitted in printing.]

60 Supreme Court of the United States

Order allowing certiorari

Filed November 12, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 44785. U. S. Circuit Court of Appeals, Third Circuit. Term No. 436. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Estate of John M. Enright, Deceased, James G. Enright, Emma E. Neilson and Mildred L. Enright, Executors. Petition for a writ of certiorari and exhibit thereto. Filed September 14, 1940. Term No. 436 O. T. 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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